

Calendar No. 700

111TH CONGRESS }
2d Session }

SENATE

{ REPORT
111-370 }

CONTINUING CHEMICAL FACILITIES
ANTITERRORISM SECURITY ACT OF 2010

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

H.R. 2868

TO AMEND THE HOMELAND SECURITY ACT OF 2002 TO ENHANCE
SECURITY AND PROTECT AGAINST ACTS OF TERRORISM
AGAINST CHEMICAL FACILITIES, TO AMEND THE SAFE DRINK-
ING WATER ACT TO ENHANCE THE SECURITY OF PUBLIC
WATER SYSTEMS, AND TO AMEND THE FEDERAL WATER POLLU-
TION CONTROL ACT TO ENHANCE THE SECURITY OF WASTE-
WATER TREATMENT WORKS, AND FOR OTHER PURPOSES



DECEMBER 16, 2010.—Ordered to be printed

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Mr. LIEBERMAN, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany H.R. 2868]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (H.R. 2868) to amend the Homeland Security Act of 2002 to enhance security and protect against acts of terrorism against chemical facilities, to amend the Safe Drinking Water Act to enhance the security of public water systems, and to amend the Federal Water Pollution Control Act to enhance the security of wastewater treatment works, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill do pass.

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I. PURPOSE AND SUMMARY

The purpose of H.R. 2868 is to reauthorize the Department of Homeland Security's Chemical Facility Anti-Terrorism Standards (CFATS), which regulates security at high-risk facilities that make or use hazardous chemicals. Thousands of such facilities exist in the United States, and a successful terrorist attack on any of them could cause extensive harm. The CFATS program requires these high-risk facilities to design and implement site security plans to

deter or prevent such attacks, and to respond more effectively if an attack does occur. As reported by the Committee, H.R. 2868 would extend the program until October 4, 2013, and add several voluntary features to the program.

II. BACKGROUND AND NEED FOR LEGISLATION

In the aftermath of the September 11, 2001 terrorist attacks, security experts and policymakers focused on the potential threat posed by thousands of facilities that make or use hazardous chemicals. A myriad of civic and industrial operations—including water purification, pharmaceutical production, oil refining and more—incorporate hazardous chemicals into their activities. Many of these facilities already faced environmental and safety regulations, but prior to the CFATS program they did not face any federal security program aimed at preventing and deterring a deliberate attack seeking to exploit the toxicity of such chemicals. Various expert reports and planning scenarios estimate that tens of thousands of people could be killed or hurt by a successful attack on certain high-risk chemical facilities.

Early legislative proposals to regulate chemical site security did not advance in the years immediately following the 9/11 attacks.

In the 109th Congress, this Committee held numerous hearings on chemical site security that underscored the need for a federal program.¹ Witnesses from the Bush Administration, the U.S. Chemical Safety and Hazard Investigation Board, the Government Accountability Office and elsewhere testified that chemical facilities present unique and potentially devastating security risks, and that voluntary efforts to secure them were not sufficient.² In 2006, the Committee approved a bill, S. 2145 (S. Rept. 109–332) to create a chemical site security program at the Department of Homeland Security (DHS).³ While that particular bill was not considered by the full Senate, Congress later that year included an authorization for a DHS-led chemical security program in the Fiscal Year 2007 appropriations bill for the Department of Homeland Security.⁴ DHS issued rules for the program on April 9, 2007, which became effective on June 9, 2007.⁵

That program, known as the Chemical Facility Anti-terrorism Standards or CFATS, is under way. The original authorization included a 3-year sunset that would have terminated the program on October 4, 2009. The program was extended until October 4, 2010 by the Fiscal Year 2010 appropriations bill for the Department of

¹ *Chemical Attack on America: How Vulnerable Are We? Hearing Before the Senate Comm. On Homeland Security and Governmental Affairs*, S.Hrg. 109–62; *Is the Federal Government Doing Enough to Secure Chemical Facilities and Is More Authority Needed? Hearing Before the Senate Comm. On Homeland Security and Governmental Affairs*, S.Hrg. 109–175; *Chemical Facility Security: What is the Appropriate Federal Role? Hearing before the Senate Comm. on Homeland Security and Governmental Affairs*, Parts I and II (S.Hrg. 109–382).

² S. Rept. 109–332, *Report of the Committee on Homeland Security and Governmental Affairs of the United States Senate to Accompany S. 2145*, pp. 7–17.

³ S. 2145 was introduced by Sens. Collins and Lieberman, with original cosponsors Sens. Coleman, Carper and Levin.

⁴ The Homeland Security Appropriations Act, 2007, P.L. 109–295, Section 550 (6 U.S.C. § 121 note).

⁵ 6 CFR Part 27 (April 9, 2007).

Homeland Security.⁶ The President requested another one-year extension as part of the Fiscal Year 2011 budget request.⁷

The CFATS program generally applies to any facility that possesses more than a threshold amount of certain dangerous chemicals. Close to 38,000 facilities have completed “Top Screen” assessments to determine whether they fall under the program, and more than 6,000 have been preliminarily “screened into” the program by DHS.⁸ These facilities are reviewed for assignment to one of four risk tiers, with facilities in the riskiest tiers required to meet the most strenuous security requirements. As of October 2010, more than 4,700 high-risk facilities had received final tiering decisions under the CFATS program.

While extensions of the sunset provision are sufficient to keep the CFATS program going, there is widespread interest in a permanent or more long-term authorization to add predictability and stability to the program. Some lawmakers and advocates would also like to expand or revise the existing program in certain respects.

As passed by the House, H.R. 2868 would permanently authorize, and make several significant changes to, the existing CFATS program. For example, the bill would require facilities covered under the existing Maritime Transportation Security Act (MTSA) to submit additional information to the Secretary to determine if such facilities present a similar security risk to those in the CFATS program and should be required to meet CFATS security standards. The bill would create a new security program governing drinking and wastewater facilities, which would be administered by the Environmental Protection Agency, in coordination with DHS. The House bill also would require all CFATS facilities to consider process modifications to reduce the consequences of a terrorist attack. If certain conditions were met, DHS would be allowed to mandate that covered facilities in the top two risk tiers implement these process changes. The House-passed bill also included additional changes. During a business meeting on July 28, 2010, the Committee considered H.R. 2868 and adopted a complete substitute that would extend the CFATS program for three years, until October 4, 2013. The substitute effectively would preserve the existing CFATS program, subject to any future adjustments DHS might implement through regulations or other directives consistent with the existing statutory authorization in Section 550 of P.L. 109–295. The substitute also would add new provisions to enhance implementation of the existing program. The substitute amendment would create voluntary exercise and training programs to improve collaboration with the private sector and State and local officials. It would create a voluntary technical assistance program to allow DHS, at the request of an owner or operator of a covered facility,

⁶The Department of Homeland Security Appropriations Act, 2010, P.L. 111–83, Section 550. A bill making continuing appropriations for portions of Fiscal Year 2011 further extended CFATS until December 3, 2010. Continuing Appropriations Act, 2011, P.L. 111–242, Section 124. A second bill making continuing appropriations for Fiscal Year 2011 extended the program until December 18, 2010, P.L. 111–290.

⁷The Budget of the United States Government, Fiscal Year 2011, Appendix, p. 574.

⁸Chemical Security: Assessing Progress and Charting a Path Forward: Hearing Before the Senate Comm. on Homeland Security and Governmental Affairs, 111th Cong. (2010) (statement of Rand Beers). Since Under Secretary Beers’ testimony, hundreds of those facilities were subsequently able to “tier out” of the program due to clarifications in their submissions or voluntary modifications in their operations.

to provide non-binding assistance or recommendations on CFATS compliance or to otherwise reduce the risk or consequences of a potential attack on the facility. The Secretary also would be directed to establish a program to collect information on best practices and cost-effective technologies for implementing CFATS and the voluntary technical assistance program, and to voluntarily share such information with covered facilities, consistent with certain protections for sensitive or proprietary data. The amendment would also create an advisory board to help DHS implement the voluntary technical assistance program and the CFATS program generally.

III. LEGISLATIVE HISTORY

H.R. 2868 was introduced on June 15, 2009, by Representative Bennie Thompson, Chairman of the Committee on Homeland Security, Representative Henry Waxman, Chairman of the Committee on Energy and Commerce, and others. The Committee on Homeland Security ordered the bill reported on June 23, 2009, by a vote of 18 to 11. The bill was next considered by the Committee on Energy and Commerce. That Committee ordered the bill reported, as amended, on October 21, 2009, on a 29 to 18 vote. The full House approved the bill 230–193 on November 6, 2009.⁹

The bill was received in the Senate and referred to this Committee. On March 3, 2010, the Committee held a hearing on the CFATS program, titled “Chemical Security: Assessing Progress and Charting a Path Forward.” At that hearing, the DHS Under Secretary for the National Protection and Programs Directorate testified that the CFATS program is an important addition to the nation’s homeland security efforts and should be extended and modified in several respects. Under Secretary Beers, joined by Peter S. Silva, Assistant Administrator for Water at the U.S. Environmental Protection Agency, laid out several key Administration “principles” related to the reauthorization of CFATS and other associated matters. First, the Administration endorsed the permanent authorization of the CFATS program. Second, Under Secretary Beers proposed creating an additional, parallel security program for drinking water and wastewater treatment facilities, led by the Environmental Protection Agency but supported by DHS. Within the modified CFATS program, the Administration proposed that all covered facilities be required to consider implementation of “inherently safer technology” or IST, and sought the ability to mandate the implementation of IST options for facilities in the two riskiest tiers, subject to various conditions. Drinking water and wastewater treatment facilities would be subject to similar requirements with respect to IST. In addition to these modifications, the Administration recommended that facilities regulated under the Maritime Transportation Security Act (MTSA) meet equivalent security standards to those facilities under CFATS to ensure consistent security across the different regulatory regimes.

A second panel included witnesses from different stakeholder groups.

⁹H. Rept. 111–205 Part 1 (Committee on Homeland Security, July 13, 2009); H. Rept. 111–205 Part 2 (Committee on Energy and Commerce, October 23, 2009). The bill’s provisions regarding drinking water facilities are discussed in a related report: H. Rept. 111–313 to accompany H.R. 3258, The Drinking Water System Security Act of 2009.

Darius Sivin, legislative representative for the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, endorsed many key features of H.R. 2868, such as creating security requirements for drinking water and wastewater treatment facilities and requiring facilities to consider, and in some cases implement, safer technologies. Sivin testified that his union represents workers in a number of facilities that use high-risk chemicals, and that those chemicals put both the workers and surrounding communities in potential danger in the event of an accident or terrorist attack. Sivin said he believes at least some of these facilities and other high-risk facilities can implement safer processes that would improve security without risking jobs. He cited the example of numerous wastewater treatment facilities that have converted from chlorine gas to ultraviolet light or liquid chlorine bleach.¹⁰

However, witnesses for two chemical industry trade associations said it is premature to change the CFATS program, and expressed support for a bill by Senator Collins, S. 2996, to extend the existing CFATS rules for an additional five years—until October 4, 2015.¹¹ Timothy J. Scott, Chief Security Officer at Dow Chemical Company and testifying on behalf of the American Chemistry Council, said the five-year extension would give DHS time to fully implement and assess the existing rules and give facilities needed regulatory stability. Scott said companies are in the process of complying with CFATS, and the program will require many of those facilities to make significant new investments in security.

Stephen Poorman, testifying for the Society of Chemical Manufacturers and Affiliates, warned that the House bill would cost jobs and threaten production of popular products. Poorman criticized a requirement that all facilities covered by CFATS consider IST options and the ability of DHS to mandate implementation for the riskiest facilities under certain conditions, warning that such process decisions are too complex to lend themselves to regulation. He said some companies are already adopting alternative processes as a means to drop out of the CFATS program or move to a lower risk tier within the program.

The Committee considered H.R. 2868 on July 28, 2010. At the markup, Chairman Lieberman endorsed extending the CFATS pro-

¹⁰Sivin's union is part of a coalition of more than 50 environmental, labor and other citizen groups, known as the Blue-Green Coalition, lobbying for expanded and permanent chemical site security rules. A statement from the Coalition is included in the record for the March 3, 2010 hearing. The statement notes that the current CFATS program omits hundreds of facilities that are potentially high-risk (i.e. drinking water and wastewater treatment facilities and those in port areas), and does nothing to explicitly promote or require the adoption of safer processes. At Senator Lieberman's request, the record also includes a report from the Center for American Progress detailing dozens of instances in which facilities are using extremely hazardous materials or processes when safer alternatives may exist (and in some cases have been implemented by similar facilities).

¹¹Senator Collins also entered into the record letters indicating support for S. 2996 from 28 other organizations and businesses. Senator Collins also entered statements for the record from Dr. Sam Mannan, Director of the Mary Kay O'Connor Process Safety Center at Texas A&M University; Mr. Tom Curtic, Deputy Executive Director for Governmental Affairs for the American Water Works Association (AWWA); and the National Petrochemical & Refiners Association (NPRA). In his testimony for the record, Dr. Mannan focused on the need for far more research and data before a federal mandate to implement or even consider "inherently safer technology" could be incorporated into the law. AWWA's testimony raised its concerns with the ability of the federal government to mandate "inherently safer technology" at water utilities, stressing its belief that "such decisions must be based on critical local factors" and that any legislation on the issue "must retain local decision making authority." NPRA's testimony expressed support for S. 2996 and urged that "decisions [regarding 'inherently safer technology'] should be left to individual sites and not mandated by DHS."

gram, and also expressed support for changes included in the House bill to require CFATS facilities to assess and in some cases implement safer technologies, and to extend parallel security requirements to drinking and wastewater facilities.¹² Senator Collins said the existing CFATS program is effective and that it would be premature and potentially harmful to make major changes. Senator Collins, on behalf of herself and Senators Pryor, Voinovich, and Landrieu, offered a substitute amendment to strike all of the House bill and replace it with a three-year extension of the existing CFATS rules, augmented by several additional features such as voluntary exercise and training programs, voluntary technical assistance programs, and increased information sharing between DHS and industry on best practices. The Committee adopted the Collins substitute amendment by unanimous consent.¹³ Members then voted 13–0 to report the bill as amended, with Senators Lieberman, Levin, Akaka, Carper, Pryor, Landrieu, McCaskill, Tester, Collins, Brown, McCain, Voinovich, and Ensign voting Yea. No Senator voted Nay. For the record only, Senators Burris, Kaufman, Coburn, and Graham voted Yea by proxy. There were no senators voting Nay by proxy.

IV. SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This section names the Act the “Continuing Chemical Facilities Antiterrorism Security Act of 2010.”

Section 2. Extension of Chemical Facilities Security Program

(a) This subsection extends the authorization for the Chemical Facilities Anti-Terrorism Standards, Section 550(b) of Homeland Security Appropriations Act, 2007 (6 U.S.C. 121 note), for three years until October 4, 2013.

(b) This subsection includes several enhancements to the existing CFATS program: a voluntary chemical security training program; a voluntary chemical security exercise program; a voluntary technical assistance program; and creation of an advisory board to help implement the technical assistance program.

Voluntary Chemical Security Training Program—The legislation would direct the Administrator of the Federal Emergency Management Agency (FEMA), in coordination with the DHS Under Secretary for National Protection and Programs (NPPD), to establish a voluntary training program to enhance the capabilities of high-risk chemical facilities to prevent, prepare for, respond to, mitigate against, and recover from threatened or actual acts of terrorism, and natural and man-made disasters. The program should encompass governmental and private sector entities across multiple disciplines, and should be coordinated with training offered by other institutions.

¹² www.hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&&FileStore_id=16717035-b7ed-40ae-965d-16471ef1e39b

¹³ Senator Carper circulated and discussed an amendment to require facilities in the CFATS program to require all facilities in the program to assess inherently safer technology options to improve security—similar to an existing state requirement in New Jersey. Senator Carper urged members to consider adding such a requirement to the CFATS program as the reauthorization bill advanced, but did not formally offer the amendment or seek a vote on it.

Voluntary Chemical Security Exercise Program—The legislation also directs FEMA, in coordination with NPPD, to establish a voluntary exercise program to test and evaluate the capabilities of governmental and private sector entities to prevent, prepare for, mitigate against, respond to, and recover from an attack or disaster at facilities using hazardous chemicals. The program should include live exercises for high risk facilities, and should be assessed to establish best practices that can be shared with affected stakeholders.

Voluntary Technical Assistance Program—The legislation would direct the DHS Assistant Secretary for Infrastructure Protection, in coordination with the Under Secretary for Science and Technology, to create a voluntary technical assistance program to provide non-binding assistance or recommendations to facilities on measures to reduce the risk of or consequences from a potential attack on the facility, such as employing safer chemicals or processes. The program would receive at least \$5 million annually, to be drawn from the overall CFATS appropriation.

Advisory Board—The legislation would direct the Secretary of Homeland Security to establish a 9-member Chemical Facility Security Advisory Board to advise the Department on implementation of the CFATS program, including the voluntary technical assistance program created by this section. The board must include at least 5 owners or operators of a covered facility, at least two employees of such facilities, and two additional experts in the fields of chemistry, security, process design and engineering, and other related fields. This board would be established under section 871 of the Homeland Security Act, and would be subject to the Federal Advisory Committee Act (5 U.S.C. App.).

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill. As indicated in the Congressional Budget Office cost estimate for this bill (included below), the bill as amended would extend an existing regulatory program with few changes and should not result in significant additional costs beyond the current costs of complying with the CFATS program.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 16, 2010.

Hon. JOSEPH I. LIEBERMAN,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2868, the Continuing Chemical Facilities Antiterrorism Security Act of 2010.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Jason Wheelock.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 2868—Continuing Chemical Facilities Antiterrorism Security Act of 2010

Summary: H.R. 2868 would extend through fiscal year 2013 the Department of Homeland Security's (DHS's) authority to regulate security at chemical facilities that present a high level of security risk. In addition, the act would establish programs to provide technical assistance to such facilities on methods to reduce the risk of or consequences from acts of terrorism, and security training for facilities personnel and first responders.

CBO estimates that implementing this legislation would cost \$414 million over the 2011–2015 period, assuming appropriation of the necessary amounts. Enacting H.R. 2868 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 2868 would extend intergovernmental and private-sector mandates, as defined in the Unfunded Mandates Reform Act (UMRA), on owners and operators of public and private facilities where certain chemicals are present. Based on information from DHS and industry sources, CBO estimates that the aggregate costs of complying with the mandates would be small and would fall below the annual thresholds established in UMRA for intergovernmental and private-sector mandates (\$70 million and \$141 million, respectively, in 2010, adjusted annually for inflation).

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 2868 is shown in the following table. The cost of this legislation falls within budget functions 050 (national defense) and 450 (community and regional development).

	By fiscal year, in millions of dollars—					
	2011	2012	2013	2014	2015	2011–2015
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Chemical Facilities Antiterrorism Security Program:						
Estimated Authorization Level	84	86	88	0	0	258
Estimated Outlays	29	59	82	54	24	248
FEMA Chemical Security Programs:						
Estimated Authorization Level	18	35	36	37	38	164
Estimated Outlays	11	28	36	37	38	150
Voluntary Technical Assistance Program:						
Authorization Level	5	5	5	0	0	15
Estimated Outlays	2	4	5	3	1	15
Chemical Facility Advisory Board:						
Estimated Authorization Level	*	*	*	*	*	1
Estimated Outlays	*	*	*	*	*	1
Total Changes:						
Estimated Authorization Level	107	126	129	37	38	438
Estimated Outlays	42	91	123	94	63	414

Notes: Components do not sum to totals because of rounding.

FEMA = Federal Emergency Management Agency; * = less than \$500,000.

Basis of estimate: For this estimate, CBO assumes that H.R. 2868 will be enacted in calendar year 2010, that the estimated and specified amounts will be appropriated each year, and that outlays will follow historical spending patterns for existing or similar programs.

Chemical Facilities Antiterrorism Security Program

The act would extend for three years the authority for DHS to regulate security at chemical facilities in the United States that present a high level of security risk. Under the current program, DHS reviews the security plans of high-risk facilities and conducts on-site inspections to evaluate compliance with site-specific security plans and the Chemical Facility Antiterrorism Standards (CFATS). Not including personnel compensation, DHS received approximately \$56 million in fiscal year 2010 to conduct such activities. In addition, CBO estimates that DHS received \$27 million in that same year to pay for salaries and benefits of the DHS employees associated with the CFATS program. Based on current personnel levels and expenditures, CBO estimates that continuing this effort would require the employment of approximately 200 personnel within DHS's National Protection and Programs Directorate, and would cost about \$250 million over the 2011–2015 period.

FEMA Chemical Security Programs

H.R. 2868 contains provisions that would direct the Federal Emergency Management Agency (FEMA) to provide voluntary training and exercises for high-risk chemical facilities to prevent, prepare for, respond to, and recover from natural and man-made disasters and other emergencies. Training would target officials and emergency responders from all levels of government and the private sector, as well as individuals located in neighborhoods adjacent to such facilities. Based on current and historical expenditures of similar preparedness programs—including FEMA's Radiological Emergency Preparedness Program—and assuming lower costs in 2011 for enactment part way through the fiscal year, CBO estimates that those provisions would cost \$150 million over the 2011–2015 period.

Voluntary Technical Assistance Program

H.R. 2868 would establish a technical assistance program through which DHS would provide assistance and recommendations to chemical facilities to enable such facilities to reduce the risk of and consequences from acts of terrorism. As part of the program, DHS would be required to develop a repository of information on effective practices for implementing CFATS. The act would authorize the appropriation of \$5 million annually through 2013 to provide technical assistance to facilities that request aid under the program. Based on the authorized amounts, CBO estimates that implementing this provision would cost \$15 million over the 2011–2015 period.

Chemical Facility Advisory Board

The act would require that the Secretary of DHS establish a Chemical Facility Advisory Board. The board would consist of nine members, seven of whom would represent chemical facilities covered by the CFATS and two of whom would be experts on topics related to the security of chemical facilities. CBO estimates, based on the costs associated with other DHS advisory bodies, that implementing this provision would cost \$1 million over the 2011–2015 period.

Pay-As-You-Go considerations: None.

Intergovernmental and private-sector impact: H.R. 2868 would extend intergovernmental and private-sector mandates, as defined in UMRA, on owners and operators of public and private facilities where certain chemicals are present. Based on information from DHS and industry sources, CBO estimates that the aggregate costs of complying with the mandates would be small and would fall below the annual thresholds established in UMRA for intergovernmental and private-sector mandates (\$70 million and \$141 million, respectively, in 2010, adjusted annually for inflation).

The act would extend, for three years, mandates contained in CFATS, which are set to expire in December 2010. Those mandates require owners and operators of public and private facilities where certain chemicals are present to assess the vulnerability of their facilities to a terrorist incident and to prepare and implement security plans. The act also would extend mandates that require owners and operators of such facilities to maintain records, periodically submit reviews of the adequacy of vulnerability assessments or security plans, and allow DHS access to their property for inspections and verifications. In addition, owners and operators would have to continue to conduct background checks on employees who have access to restricted areas, and provide training to employees. Because facilities must currently comply with the existing CFATS regulations, CBO estimates that the cost of continuing to comply with those regulations would be small relative to the annual thresholds established in UMRA.

Previous CBO estimates: On October 23, 2009, CBO transmitted a cost estimate for H.R. 2868 as ordered reported by the House Committee on Energy and Commerce on October 22, 2009. In addition, on July 9, 2009, CBO transmitted a cost estimate for H.R. 2868 as ordered reported by the House Committee on Homeland Security on June 23, 2009. Both of those versions of the legislation would permanently authorize and expand the authority of DHS to regulate security at chemical facilities and would authorize the appropriation of \$900 million over the 2011–2013 period for such purpose, a significant increase over current spending levels.

The Senate version of the legislation does not provide a specific authorization of appropriations and would extend the existing authority for DHS to regulate chemical facilities until the end of fiscal year 2013. The estimated costs for this version of the legislation reflect its more limited scope.

Estimate prepared by: Federal Costs: Jason Wheelock (DHS) and Daniel Hoople (FEMA); Impact on State, Local, and Tribal Governments: Melissa Merrell; Impact on the Private Sector: Paige Piper/Bach.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

VII. CHANGES TO EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by H.R. 2868 as reported are shown as follows (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE**TITLE 6—DOMESTIC SECURITY****CHAPTER 1—HOMELAND SECURITY ORGANIZATION**

* * * * *

**SUBCHAPTER II—INFORMATION ANALYSIS AND
INFRASTRUCTURE PROTECTION****Part A—Information and Analysis and Infrastructure
Protection; Access to Information****SEC. 121. INFORMATION AND ANALYSIS AND INFRASTRUCTURE PRO-
TECTION.**

* * * * *

REGULATIONS

Pub. L. 109–295, title V, Sec. 550, Oct. 4, 2006, 120 Stat. 1388, as amended by Pub. L. 110–161, div. E, title V, Sec. 534, Dec. 26, 2007, 121 Stat. 2075; Pub. L. 111–83, title V, Sec. 550, Oct. 28, 2009, 123 Stat. 2177, provided that:

“(a) * * *

“(b) Interim regulations issued under this section shall apply until the effective date of interim or final regulations promulgated under other laws that establish requirements and standards referred to in subsection (a) and expressly supersede this section: Provided, That the authority provided by this section shall terminate on [October 4, 2010] *October 4, 2013*.

* * * * *

TITLE XXI—CHEMICAL FACILITY SECURITY**SEC. 2101. DEFINITIONS.**

In this title—

(1) the term “Board” means the Chemical Facility Security Advisory Board established under section 2105(a);

(2) the term “Chemical Facility Anti-Terrorism Standards” means the interim final regulations issued by the Secretary under section 550 of the Department of Homeland Security Appropriations Act, 2007 (6 U.S.C. 121 note); and

(3) the term “covered chemical facility” means a chemical facility subject to the Chemical Facility Anti-Terrorism Standards.

SEC. 2102. CHEMICAL SECURITY TRAINING PROGRAM.

(a) *ESTABLISHMENT.*—Acting through the Administrator of the Federal Emergency Management Agency and in coordination with the Under Secretary for National Protection and Programs, the Secretary shall establish a voluntary chemical security training program (referred to in this section as the “training program”) for the purpose of enhancing the capabilities of high-risk chemical facilities to prevent, prepare for, respond to, mitigate against, and recover from threatened or actual acts of terrorism, natural disasters, and other man-made disasters.

(b) *REQUIREMENTS.*—The training program shall provide validated voluntary training that—

(1) reaches multiple disciplines, including Federal, State, and local government officials, commercial personnel and management, and governmental and nongovernmental emergency response providers;

(2) provides training at the awareness, performance, and management and planning levels;

(3) uses multiple training mediums and methods;

(4) is coordinated with training provided by government training facilities, academic institutions, private organizations, and other entities that provide specialized, state-of-the-art training for governmental and nongovernmental emergency responder providers or commercial personnel and management;

(5) uses, as appropriate, government training facilities, courses provided by community colleges, public safety academies, State and private universities, and other facilities;

(6) is consistent with, and supports implementation of, the National Incident Management System, the National Response Framework, the National Infrastructure Protection Plan, the National Preparedness Guidance, the National Preparedness Goal, the National Maritime Transportation Security Plan, and other such national initiatives, and any successors thereto;

(7) is evaluated against clear and consistent performance measures;

(8) addresses security requirements under chemical facility security plans; and

(9) educates, trains, and involves individuals in neighborhoods around chemical facilities on how to observe and report security risks.

SEC. 2103. CHEMICAL SECURITY EXERCISE PROGRAM.

(a) *IN GENERAL.*—Acting through the Administrator of the Federal Emergency Management Agency and in coordination with the Under Secretary for National Protection and Programs, the Secretary shall develop a voluntary chemical security exercise program (referred to in this section as the “exercise program”) for the purpose of offering voluntary testing and evaluation of the capabilities of the Federal Government, State governments, commercial personnel and management, governmental and nongovernmental emergency response providers, the private sector, or any other organization or entity, as the Secretary determines to be appropriate, to prevent, prepare for, mitigate against, respond to, and recover from acts of terrorism, natural disasters, and other emergencies at chemical facilities.

(b) *REQUIREMENTS.*—Under the exercise program, the Secretary shall conduct, on a periodic basis, voluntary joint security exercises at chemical facilities that are—

(1) scaled and tailored to the needs of each chemical facility;
 (2) for the highest risk chemical facilities, as determined by the Secretary, live training exercises;

(3) as realistic as practicable and based on current risk assessments, including credible threats, vulnerabilities, and consequences;

(4) consistent with the National Incident Management System, the National Response Framework, the National Infrastructure Protection Plan, the National Preparedness Guidance, the National Preparedness Goal, the National Maritime Transportation Security Plan, and other such national initiatives, and any successors thereto;

(5) evaluated against clear and consistent performance measures;

(6) assessed to learn best practices, which shall be shared with appropriate Federal, State, and local officials, commercial personnel and management, governmental and nongovernmental emergency response providers, and the private sector;

(7) followed by remedial action in response to lessons learned; and

(8) designed to assist State and local governments and chemical facilities in designing, implementing, and evaluating exercises that—

(A) conform to the requirements of this paragraph; and

(B) are consistent with any applicable Buffer Zone Protection Plan, State homeland security plan, or urban area homeland security plan.

SEC. 2104. VOLUNTARY TECHNICAL ASSISTANCE PROGRAM.

(a) *ESTABLISHMENT.*—The Secretary, acting through the Assistant Secretary for Infrastructure Protection, in coordination with the Under Secretary for Science and Technology, and in consultation with the Board, shall establish a voluntary technical assistance program under which, upon request by the owner or operator of a covered chemical facility, and subject to the availability of resources at the Department, the Secretary may provide nonbinding assistance or recommendations to the owner or operator to—

(1) reduce the risk or consequences associated with a successful act of terrorism against a covered chemical facility, including the reduction of risk or consequences—

(A) sufficient to decrease the risk-based tier assigned to the covered chemical facility under the Chemical Facility Anti-Terrorism Standards; or

(B) such that the covered chemical facility no longer presents a high level of security risk; or

(2) aid in compliance with the risk based performance standards applicable to the covered chemical facility under the Chemical Facility Anti-Terrorism Standards.

(b) *VOLUNTARY NATURE OF ASSISTANCE.*—

(1) *IN GENERAL.*—The decision to—

(A) participate in the voluntary technical assistance program under this section; or

(B) implement any assistance or recommendations provided by the Secretary under this section, shall be at the sole discretion of the owner or operator of a covered chemical facility.

(2) *NO REQUIRED ASSESSMENT.*—The Secretary may not require the owner or operator of a covered chemical facility to—

(A) consider any assistance or recommendation provided under this section as part of a security vulnerability assessment under the Chemical Facility Anti-Terrorism Standards; or

(B) assess, directly or indirectly, the costs, benefits, economic or technical feasibility, or practicality of implementing any assistance or recommendation provided under this section.

(3) *SITE SECURITY PLAN REVIEW.*—If the site security plan for a covered chemical facility satisfies the risk-based performance standards applicable to the covered chemical facility under the Chemical Facility Anti-Terrorism Standards, the Secretary may not disapprove the site security plan based on—

(A) a decision by the owner or operator of a covered chemical facility not to—

(i) participate in the voluntary technical assistance program under this section; or

(ii) implement assistance or a recommendation provided by the Secretary under this section; or

(B) the presence or absence of a particular security measure.

(4) *EFFECT ON TIERING.*—At the request of the owner or operator of a covered chemical facility, the Secretary shall advise the owner or operator of the overall effect that implementing all categories of assistance or recommendations provided by the Secretary under this section would have on the determination by the Secretary—

(A) of the placement of the covered chemical facility in a risk-based tier under the Chemical Facility Anti-Terrorism Standards; or

(B) regarding whether the covered chemical facility would no longer present a high level of security risk.

(5) *CIVIL LIABILITY.*—

(A) *IN GENERAL.*—Subject to subparagraph (B), no action, or failure to act, by the owner or operator of a covered chemical facility relating to assistance or a recommendation provided by the Secretary under this section shall be interpreted, construed, implied, or applied to create any liability or cause of action for compensation for bodily injury, any other injury, or property damage to any person that may result from an act of terrorism or incident at the covered chemical facility.

(B) *ADDITIONAL OR INTERVENING ACTS OR OMISSIONS.*—Subparagraph (A) shall not apply to any injury or damage caused by any additional or intervening act or omission of the owner or operator of a covered chemical facility.

(C) *RULE OF CONSTRUCTION.*—Except as provided in this section, nothing in subparagraph (A) shall be construed to abrogate or limit any right, remedy, or authority that the

Federal Government, any State or local government, or any entity or agency of the Federal Government or a State or local government may possess under any other provision of law.

(c) **BEST PRACTICES.**—Subject to subsection (d), the Secretary shall develop a repository for information and data on best practices and cost-effective technologies for implementing the Chemical Facility Anti-Terrorism Standards and the voluntary technical assistance program under this section.

(d) **INFORMATION PROTECTION.**—Any information obtained by the Secretary under the voluntary technical assistance program under this section or for purposes of subsection (c) shall—

(1) to the extent that the information may reveal vulnerabilities or other details of the security capabilities of a covered chemical facility that may be exploited by terrorists, be protected as chemical-terrorism vulnerability information under the Chemical Facility Anti-Terrorism Standards; and

(2) to the extent that the information may reveal trade secrets or commercial or financial information that is not customarily in the public domain, be protected as though the information was voluntarily shared critical infrastructure information under section 214, except that the requirement under section 214 that the information be voluntarily submitted, including the requirement for an express statement specified in section 214(a)(2), shall not apply to information obtained under this section.

(e) **REPORT ON LESSONS LEARNED.**—Not later than October 4, 2013, the Secretary, in coordination with the Board, shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Homeland Security of the House of Representatives a report regarding lessons learned from the voluntary technical assistance program under this section.

(f) **AVAILABILITY OF APPROPRIATIONS.**—Of the amounts made available for the Chemical Facility Anti-Terrorism Standards for each of fiscal years 2011 through 2013, not less than \$5,000,000 shall be made available for the provision of voluntary technical assistance under this section.

SEC. 2105. CHEMICAL FACILITY SECURITY ADVISORY BOARD.

(a) **ESTABLISHMENT.**—Not later than 90 days after the date of enactment of this section, the Secretary shall establish under section 871 a Chemical Facility Security Advisory Board.

(b) **RESPONSIBILITIES.**—The Board shall advise the Secretary on the implementation of the Chemical Facility Anti-Terrorism Standards, including regarding the implementation of the voluntary technical assistance program under section 2103.

(c) **MEMBERSHIP.**—There shall be 9 members of the Board, who shall be appointed by the Secretary and shall represent a geographic and substantive cross-section of the United States, including—

(1) not less than 5 owners or operators of covered chemical facilities;

(2) not less than 2 employees of covered chemical facilities with direct responsibility for process design and engineering, production and operations, or chemical process security, and

(3) *not less than 2 other experts in the fields of chemistry, security, process design and engineering, process controls and instrumentation, environmental health and safety, maintenance, production and operations, or chemical process security.*

(d) *TERM.—The members of the Board shall be appointed for such terms as the Secretary may determine.*

(e) *APPLICABILITY OF FEDERAL ADVISORY COMMITTEE ACT.—The Federal Advisory Committee Act (5 U.S.C. App.) shall apply to the Board.*

SEC. 2106. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated to the Secretary such sums as are necessary to carry out this title.

